

FEDERAL MAGISTRATES COURT OF AUSTRALIA

ZAOUK v MINISTER FOR IMMIGRATION & ANOR [2006] FMCA 1607

MIGRATION – Visa – Partner (Temporary) (Class UK) visa – Partner (Residence) (Class BS) visa – Prospective Marriage (Temporary) (Class TO) visa – where marriage came to an end – domestic violence – “sponsoring spouse” – jurisdictional error.

PRACTICE & PROCEDURE – Judicial comity.

Migration Act 1958 (Cth) s.359

Migration Regulations 1994 (Cth) Regs.1.15A, 1.23, 1.26

Migration Amendment Regulations 2005 (No 4) Sched. 3

Meroka v Minister for Immigration and Multicultural Affairs (2002) 117 FCR 251; [2002] FCA 482 followed.

Collins v Minister for Immigration [2003] FMCA 571 not followed.

Cakmak v Minister for Immigration & Multicultural & Indigenous Affairs 135 FCR 482 considered.

Sok v Minister for Immigration & Multicultural & Indigenous Affairs (2005) 144 FCR 170 considered

Minister for Immigration and Multicultural and Indigenous Affairs v SZANS [2005] FCAFC 41 applied.

Applicant:	JOSEPH ZAOUK
First Respondent:	MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS
Second Respondent:	MIGRATION REVIEW TRIBUNAL
File Number:	SYG 3498 of 2005
Judgment of:	Scarlett FM
Hearing date:	23 August 2006
Date of Last Submission:	23 August 2006
Delivered at:	Sydney

Delivered on: 31 October 2006

REPRESENTATION

Solicitors for the Applicant: Michael Jones

Counsel for the Respondent: Mr Johnson

Solicitors for the Respondent: Australian Government Solicitor

ORDERS

- (1) The title of the First Respondent is changed to Minister for Immigration & Multicultural Affairs.
- (2) The title of the Second Respondent is changed to Migration Review Tribunal.
- (3) That an order in the nature of certiorari issue quashing the decision of the Migration Review Tribunal made on 18 November 2005.
- (4) That there be an order in the nature of mandamus remitting the application for review of a decision of the delegate of the First Respondent made on 7 October 2004 to the Migration Review Tribunal for determination according to law.
- (5) That the First Respondent pay the Applicant's costs fixed in the sum of \$5,500.00.

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA AT
SYDNEY**

SYG 3498 of 2005

JOSEPH ZAOUK
Applicant

And

MINISTER FOR IMMIGRATION & MULTICULTURAL AFFAIRS
First Respondent

MIGRATION REVIEW TRIBUNAL
Second Respondent

REASONS FOR JUDGMENT

Application

1. This is an application for review of the Migration Review Tribunal dated 18th November 2005. The Tribunal affirmed a decision of a delegate of the Minister to refuse the Applicant a Partner (Temporary) (Class UK) visa or a Partner (Residence) (Class BS) visa.

Background

2. The Applicant is a national of Lebanon who first entered Australia on 3rd June 2001 as the holder of a Short Stay Sponsored (Visitor) (Class UL) visa. He left Australia on 31st August 2001. He was then sponsored by Mrs Diana Zaouk, to whom he was later married, in an

application for a Prospective Marriage (Temporary) (Class TO) visa. He re-entered Australia on 12th April 2002. The Applicant and his wife were married on 25th October 2002.

3. The Applicant applied for Partner (Temporary) (Class UK) and Partner (Residence) (Class BS) visas on 2nd January 2003. A delegate of the Minister refused to grant these visas on 7th October 2004. The Applicant then applied to the Migration Review Tribunal on 3rd November 2004.

Application to the Migration Review Tribunal

4. The Applicant's then lawyer and migration agent (the authorised Recipient) forwarded his application for review to the Sydney Registry of the Migration Review Tribunal on 3rd November 2004, accompanied by a copy of the delegate's decision record.
5. The Tribunal wrote to the Applicant's Authorised Recipient on 15th June 2005, seeking additional information from the Applicant under the provisions of s.359(2) of the *Migration Act 1958*. The relevant part of the letter said:

You seek to rely on the domestic violence provisions of the Migration Regulations, which require the provision of statutory declarations from two competent persons stating that in their opinion you have suffered from domestic violence. You have provided a statutory declaration from a psychologist whose name is illegible, and who has not provided evidence of registration as a psychologist under a law of a state or territory. Please provide the name and evidence of registration of the psychologist, so that the Tribunal can determine whether s/he is a competent person within the meaning of the Migration Regulations.

6. The Applicant's Authorised Recipient wrote back to the Tribunal on 6th June 2005 enclosing the following documents:
 - a) Evidence of registration as a psychologist of Lila Vreklevski.
 - b) Evidence of registration of a medical practitioner of Dr Adel Zaki.
7. The Tribunal then wrote to the Applicant on 27th July 2005 and invited him to attend a hearing on 30th August 2005. The Applicant attended

the hearing and gave oral evidence. The Tribunal also heard evidence from six witnesses, three of whom were related to the Applicant and the other three were friends.

The Tribunal's Findings and Reasons

8. The Tribunal made its decision on 18th November 2005. Its findings and reasons are set out on pages 142 to 148 of the Court Book.
9. The Tribunal found that the application was no longer validly sponsored by an Australian citizen who had turned 18. As the Applicant's sponsor, his wife, had left him by the time he applied for the visa, he was relying on r. 830.211(8) which does not require that an Applicant be sponsored. It only requires that the Applicant be the holder of a subclass 300 visa, that he had married the sponsoring spouse and that the relationship had ceased.
10. The Tribunal considered whether the Applicant and his former sponsor were in a spousal relationship as defined in Regulation 1.15A of the Migration Regulations. The Tribunal considered the evidence but went on to find:
 56. *When applying the tests contained in Regulation 1.15A the Tribunal is not satisfied that the visa applicant and the sponsor were in a 'spousal relationship' in the period between the marriage and the sponsor's departure. The Tribunal is not satisfied that the parties had a mutual commitment to a shared life as husband and wife to the exclusion of all others.*
 57. *Because the Tribunal has found there was no spousal relationship established, it is not necessary for it to consider the claims of domestic violence. However, in case the Tribunal is wrong on the matter of whether a threshold spousal relationship is necessary before the domestic violence provisions can be invoked, and for the state of completeness, the Tribunal will also consider the evidence submitted in support of a claim of domestic violence.*¹
11. The Tribunal considered a statutory declaration by the Applicant and the statutory declarations by Dr Adel Zaki and the psychologist Lila

¹ See Court Book at 145

Vrklevski, being “competent persons” under the Regulations. The Tribunal made these findings:

65. *Neither of the competent persons has made a statement that the visa applicant had experienced violence that caused him to fear for, or to be apprehensive about his well-being or safety, which is encapsulated in the definition of relevant domestic violence in Regulation 1.23 (2)(b).*
66. *The Tribunal considers that the statutory declarations of Dr Zaki and Ms Vrklevski do not satisfy r. 1.26(c) on the basis that the statutory declarations fail to conform to regulation 1.23(2)(b) as they do not state that relevant domestic violence has been experienced by the visa applicant.*
67. *As the statutory declarations do not comply with r. 1.26, a non-judicial claim of domestic violence has not been made for the purposes of r. 1.23(1A) (b). Accordingly, the decision of the delegate is affirmed.²*

12. The Tribunal found that the Applicant did not meet essential criteria for the grant of a Partner (Temporary) (Class UK) visa and therefore did not meet the criteria for a Class BS visa, either.

Application for Judicial Review

13. By his application filed on 29th November 2005, the Applicant seeks:
 - a) A writ of certiorari.
 - b) A declaration that the Tribunal’s decision is void and of no effect.
 - c) A writ of prohibition.
 - d) Costs.
14. The Applicant claims that the Tribunal’s decision was affected by jurisdictional error and provides the following particulars:
 - a) The Tribunal applied a wrong test to the meaning of the word “relationship” in cl 820.211(8)(c) of the Migration Regulations. The Tribunal was not obliged to apply to that word the test in reg 1.15A.

² See Court Book at 147-148

- b) The Tribunal was not satisfied on the evidence provided by the applicant that “relevant domestic violence” had occurred. Pursuant to reg 1.23 (1B)(b), the Tribunal was required to seek the opinion of an independent expert, which it failed to do.

Submissions

- 15. The Applicant’s solicitor, Mr Jones, submitted that the Tribunal based its decision on finding that:
 - a) There had never been a “spousal relationship” within the meaning of reg 1.15A between the applicant and his sponsor; and
 - b) The evidence in relation to the claim of domestic violence did not satisfy the requirements of the regulations.
- 16. Dealing first with the issue of a spousal relationship, Mr Jones referred to the criteria for a subclass 820 visa in force at the date of the application, which begins:

820.21 Criteria to be satisfied at time of application

820.211 (1) The applicant:

a) is not the holder of a Subclass 771 (Transit) visa; and

(b) meets the requirements of subclause (2), (3), (4), (5), (6), (7), (8), or (9).

- 17. The Applicant relies on the ground in subclause 820.211 (8):

An applicant meets the requirements of this subclause if:

a) the applicant is a holder of a Subclass 300 (Prospective Marriage) visa; and

b) the applicant has married the sponsoring spouse under a marriage that it recognised as valid for the purposes of the Act; and

c) the relationship between the applicant and the sponsoring spouse has ceased; and

d) any 1 or more of the following:

i) the applicant;

ii) a member of the family unit of the applicant who has made a combined application with the applicant;

iii) a dependent child of the sponsoring spouse or of the applicant or both of them;

has suffered domestic violence committed by the sponsoring spouse.

18. Mr Jones submitted that the Tribunal had concluded that paragraph (c) had not been satisfied because there had never been a “relationship”, interpreting that term to mean a “genuine spousal relationship within the meaning of reg 1.15A”.

19. He submitted that for most purposes the term “spouse” is defined in reg 1.15A and requires a genuine and continuing relationship involving a mutual commitment to a shared life as husband and wife to the exclusion of all others. The Tribunal applied that definition, incorrectly in Mr Jones’ view.

20. The Tribunal’s interpretation was wrong, he submitted, for these reasons (taken from the text of the written submission):

*13. The paragraph refers to ‘the relationship between the applicant and the **sponsoring spouse**’ (emphasis added) The term ‘sponsoring spouse’ is given a special meaning in Part 820:*

a. for an applicant who is, or was, the holder of a prospective marriage (temporary) visa – the Australian citizen, Australian permanent resident or eligible New Zealand citizen who was specified in the application for that visa as the person whom the applicant intended to marry after entry into Australia; or

b. for any other applicant – the Australian citizen, Australian permanent resident or eligible New Zealand citizen who was specified in the application as the spouse of the applicant.

14. In this case, paragraph (a) applies. The person covered by the term ‘sponsoring spouse’ is restricted to the factually identifiable person whom the applicant intended to marry.

Paragraph (b), by contrast, imports all the criteria of reg 1.15A by its reference to 'spouse'. There would not be two definitions if it was not intended that the term have two distinct meanings.

15. For the purposes of 820.211 (8), the key element in the term 'sponsoring spouse' is the original act of sponsorship, and the meaning of the expression 'the relationship between the applicant and the sponsoring spouse has ceased' means that the sponsor has impliedly or explicitly withdrawn the sponsorship.

*16. This is confirmed by the terms of 820.211 (8) (b), which refer to a marriage that is valid for the purposes of the Act, not a marriage that involves a spousal relationship as defined in reg 1.15A. A marriage that is valid for the purposes of the Act is merely one to which Part VA of the **Marriage Act 1961** applies, with the exception of certain foreign marriages (Migration Act s. 12).*

21. Mr Jones submitted that the Court should consider the circumstances to which sub-clause (8) applies. The rationale is that a person who enters the country as a prospective spouse, marries, but does not even get the chance to file the application papers before the marriage breaks down due to domestic violence would likely be hard pressed to provide the sort of evidence of genuineness that could more reasonably be expected in normal circumstances. Accordingly, the Tribunal's error led to its asking itself the wrong question and, it is submitted, fell into jurisdictional error.
22. The Applicant's submission then goes on to consider the domestic violence issue. He submitted that by the time the application for review came before the Migration Review Tribunal Schedule 3 of the *Migration Amendment Regulations 2005 (No 4)* had introduced new requirements for the assessment of domestic violence claims. The changes applied to applications made but not finally determined before 1st July 2005, including the application the subject of these proceedings. The Applicant had to provide evidence in accordance with regulation 1.24 that domestic violence had occurred. One way of satisfying regulation 1.24 was to provide two statutory declarations under reg 1.26 from "competent persons".

23. The Applicant provided statutory declarations from Dr Zaki and Ms Vrklevski. The Tribunal claimed that

Neither of the competent persons has made a statement that the visa applicant had experienced violence that caused him to fear for, or to be apprehensive about his well-being or safety.³

24. Mr Jones points out that that is the definition of ‘relevant domestic violence’ in reg 1.23(2)(b). He went on to submit that it would be absurd to allow the purpose of the domestic violence provisions in the legislation to be defeated by a technicality in the choice of language, saying:

The ‘competent persons’ identified by the legislation are not lawyers but health professionals or social workers, who could be expected to use the language of their professional training.

25. Mr Jones referred the court to Ms Vrklevski’s use of the words “stress and trauma” and Dr Zaki’s reference to “psychic trauma” leading to “frustration, reactive depression, secondary anxiety”. He referred the court to the decision of *Meroka v Minister for Immigration and Multicultural Affairs* (2002) 117 FCR 251; [2002] FCA 482, where Ryan J said at [34]:

I do not consider that the competent person need state expressly that in his or her opinion relevant domestic violence has been suffered. The requisite statement of opinion may be conveyed by implication having regard to the way in which the standard form directs the attention of the competent person to the definition of “domestic violence” in Reg 1.23(2)(b). The implication arises in the context of that direction from the insertion in the respective spaces provided of the name and date of birth of the victim and the full name of the person to have perpetrated the domestic violence.

26. Mr Jones submitted, therefore, that pursuant to reg 1.23 (1B), since the Applicant had made a “non-judicially determined claim of domestic violence”, the Tribunal could not dismiss it without either accepting the claim or referring it to an independent expert for assessment. By not doing either of those things, the Tribunal failed to exercise its jurisdiction and therefore fell into jurisdictional error.

³ Court Book at 147

27. For the First Respondent Minister, Mr Johnson of counsel submitted that under 820.211(8) the issue of whether there was a spousal relationship as defined in regulation 1.15A between the date of the marriage and the date when the former sponsor left the Applicant did need to be examined, contrary to the Applicant's submission. The reason for this, he submitted, is that the words "the relationship between the Applicant and the sponsoring spouse" in 820.211(8)(c) is at least impliedly reference to a spousal relationship as defined in regulation 1.15A. If it had been intended by that paragraph only to catch the legal marriage ending, that could easily have been said. It is only genuine spousal relationships that are intended to attract these visas. It was common ground that the issue was examined and determined against the Applicant. The Tribunal referred to the decision of McInnis FM in *Collins v Minister for Immigration* [2003] FMCA 571 at [42].
28. Mr Johnson went on to submit that even if the Applicant's case were to be accepted on that point, that would leave the Tribunal's separate and independent finding at [65] (found at page 147 of the Court Book) that neither Dr Zaki nor Ms Vrklevski, in their statutory declarations, made a statement that the Applicant had experienced violence that caused him to fear for, or be apprehensive about, his well-being or safety that as "encapsulated in the definition of relevant domestic violence in Regulation 1.23(2)(b)."
29. Mr Johnson submitted that the Applicant's second argument does not need to be decided if the Tribunal needed to be satisfied that there was a spousal relationship in the requisite sense between the date of the marriage and when the former sponsor left the Applicant. The Tribunal was addressing that issue only in the event that it was wrong in its finding that there was no relevant spousal relationship. To succeed in the present application, the Applicant would need to win both of his arguments. For the Applicant, Mr Jones conceded that that was so.
30. Mr Johnson went on to submit that it appeared to be common ground that neither of the statements from the competent persons expressly said that the Applicant had experienced violence that had caused him to fear for, or be apprehensive about, his well-being or safety, or that he

had suffered domestic violence. I consider that he is correct in that submission.

31. Mr Johnson submitted the following:

12. *The Tribunal was entitled to conclude as it did about the content of the writing in question. If that writing was capable of supporting different inferences, it was a question of fact for the Tribunal which of those inferences to draw.*

13. *... (T)he applicant relies upon the following language: 'stress and trauma', or 'psychic trauma', or frustration, reactive depression, secondary anxiety'. These descriptors need not necessarily arise because of domestic violence, or fear/apprehension for well-being or safety resulting therefrom. The consequences of the sponsor's decision to change religion may, for example, have fulfilled such descriptors regardless of whether any domestic violence was suffered. Also, the fact that violence or abuse was suffered, if it was suffered, does not mean that the applicant was fearful/apprehensive of his well-being or safety.*

14. *The passage from Meroka v MIMA [2002] FCA 482 at [34], quoted by the applicant, accordingly does not assist him. It is noted, however, subsequent Full Court decisions discussing Meroka (differently) accept the necessary for the domestic violence to cause fear for, or apprehension about, the victim's personal well-being or safety: Cakmak v MIMIA (2003) 135 FCR 183 at [64] per Gyles, Conti and Allsop JJ; Sok v MIMIA (2005) 144 FCR 170 at [24] per Branson J (with whom Marshall J relevantly agreed at [36])(the latter Full Court taking a wider view of the kind of violence that would suffice).*

32. In summary, Mr Johnson submitted that it had not been shown that the Tribunal's decision is vitiated by jurisdictional error, but, alternatively, if there was jurisdictional error, the decision could not have been affected and relief should be refused in the discretion of the Court.

Conclusions

33. In considering the Applicant's case, it is necessary for the Court to decide whether the Applicant's first ground succeeds. The particulars of that ground are that the Tribunal applied a wrong test to the meaning of

the word “relationship” in cl.820.211(8)(c) of the Migration Regulations. It is submitted that the Tribunal was not obliged to apply to that word the test in reg 1.15A.

34. If the Applicant’s first ground succeeds, then, and only then, need the Court consider the second ground. It is conceded by the Applicant’s solicitor that the Applicant needs to succeed on both grounds.
35. In respect of the first ground, the Tribunal referred to the decision of McInnis FM in *Collins v Minister for Immigration* [2003] FMCA 571, where his honour considered the matter at [42], saying:

My reading of sub-regulation 8 is that the clear inference and basis upon which that regulation is to be applied is that (it) applies to the relationship which at least at one point could be regarded as a genuine spousal relationship. Otherwise the purpose and intent of the regulation and its meaning on a proper reading would make little sense particularly in circumstances where there may be a finding that there never has been a genuine spousal relationship and a tribunal or delegate then be required, in applying the regulations, to consider amongst other things the issue of domestic violence which would only be a saving grace in circumstances where the genuine spousal relationship had already been established.

36. Mr Jones, who appeared for the Applicant, submitted that *Collins v Minister for Immigration* was wrongly decided. Unless I am satisfied that the decision was wrong, the principle of judicial comity would require that the judgment in *Collins* ought to be followed. Clearly, the decision is on point and cannot be distinguished on its facts.
37. After some lengthy consideration, and with respect to McInnis FM, I have come to the view that I am not satisfied that this point in *Collins* has been correctly decided. It was, in fact, decided on another issue, that of procedural fairness, which is certainly not the issue here. It is clear that no argument of the sort put to me by Mr Jones on behalf of the Applicant was raised with his Honour, and that set of circumstances was not necessary for him to consider.
38. What I find persuasive in the argument put forward on behalf of the Applicant is that it appears that the term “sponsoring spouse” is given its own definition for the purposes of Subclass 820 in 820.211:

820.1 INTERPRETATION

820.111 *In this Part:*

Sponsoring spouse means:

(a) for an applicant who is, or was, the holder of a prospective marriage (temporary) visa – the Australian citizen, Australian permanent resident or eligible New Zealand citizen who was specified in the application for that visa as the person whom the applicant intended to marry after entry into Australia; or

39. The definition is complete in itself. There is no need to import any other material into the definition for it to make sense. In my view, the Court should follow the ordinary English meaning of the words. If it had been intended to import the criteria set out in Regulation 1.15A into the definition, then either a reference would have been made to the regulation or the identical wording to Regulation 1.15A would have been used.
40. I am satisfied that the Applicant's first ground succeeds. The Tribunal applied a wrong test to the meaning of the word "relationship" in cl 820.211(8)(c) of the Migration Regulations. The Tribunal was not obliged to apply to that word the test in reg 1.15A.
41. Even so, it is now necessary to consider whether the Tribunal fell into error in its finding that the statutory declarations of Dr Zaki and Ms Vrklevski "do not satisfy r.1.26(c) on the basis that their statutory declarations fail to conform to regulation 1.23(2)(b) as they do not state that relevant domestic violence has been experienced by the Visa Applicant".⁴
42. Regulation 1.23(2)(b) provides:
- (A) reference to relevant domestic violence is a reference to violence against the alleged victim or his or her property that causes the alleged victim, or a member of the alleged victim's family, to fear for, or to be apprehensive about, the alleged victim's personal well-being or safety.*
43. I turn now to consider the statutory declarations by Dr Zaki and Ms Vrklevski.

⁴ Court Book 147 at [66]

Dr Zaki's Declaration

44. The statutory declaration by Dr Zaki can be found at pages 74 and 75 of the Court Book. The copy is difficult to read, but the Applicant's solicitor produced to the Court a typed version that was considerably clearer.
45. In his declaration, Dr Zaki set out a history given to him by the Applicant⁵ and then gives his conclusions. The conclusions are set out in a box in part 11 of the form, which has these notes attached to it:

Please support your conclusions with regard to:

- *The evidence provided; and*
- *Your own observation*

For further information about what you are required by the Migration Regulations to provide, please refer to the definition of domestic violence on page 2 and Responsibilities of competent persons on page 3 of the guidelines at the front of this form.

If there is insufficient space, please provide additional pages.

46. Dr Zaki then set out his conclusions, saying:

Based on the given history and clinical assessment he's now suffering from effect of forementioned verbal, physical, mental and psychic abuse, which showed itself as depressed mood, anxiety, frustration and thought confusion in regards to the future. These constituted the syndrome of past traumatic stress disorder which will affect his mental, psychic and physical behaviour for some time. Based on the above I am of the opinion that Mr Zaouk is a victim of domestic violence.

Ms Vrklevski's Declaration

47. 47. The statutory declaration by Ms Vrklevski, the psychologist, appears at pages 64 to 66. The copy in the Court Book is quite illegible. Again, the Applicant's solicitor has provided a typed copy.
48. 48. Ms Vrklevski sets out the history given by the Applicant at part 6 of the form. It begins in this way:

⁵ Court Book 74

The domestic violence as experienced by the visa applicant occurred during the course of the marriage (and cohabitation) with his estranged wife Diana Zaouk.⁶

49. 49. The declaration continues at part 7, which has the heading:

What is the evidence on which the allegation that the person has suffered domestic violence is based?

50. 50. Ms Vrklevski then sets out her evidence as follows:

Evidence is based on observation and clinical assessment. Mr Zaouk reported the following symptoms during the marriage and after the marriage failed...

...During interview Mr Zaouk's demeanour suggested that he was open. Therefore in my professional opinion it is probable that Mr Zaouk was the recipient of verbal abuse and threats as well as physically offensive behaviour.

51. 51. Part 10 of the document asks the following questions:

Is there evidence that indicates to you that the visa applicant is a victim of domestic violence?

Please give details, citing:

- *Specific incidents of domestic violence;*
- *Dates on which the incidents occurred;*
- *The impact of these incidents on the visa applicant.*

For further information about what you are required by the Migration Regulations to provide, please refer to the definition of domestic violence on page 2 and Responsibilities of competent persons on page 3 of the guidelines at the front of this form.

52. 52. Ms Vrklevski set out her client's history, beginning in the following way:

As outlined previously, the domestic violence as experienced by the visa applicant occurred during the course of his marriage to Diana Zaouk...

53. 53. In Part 11, Ms Vrklevski stated this:

⁶ Court Book at 64

In my professional opinion – based on the demeanour of the visa applicant, interview with his brother, observations and clinical assessment it is more probable than not that Mr Zaouk experienced the verbal abuse and physical assaults as outlined previously. The reactions he reported (confirmed by interview with his brother) indicate an acute anxiety response.⁷

54. 54. Counsel for the Minister has referred to the decision of the Full Court of the Federal Court in *Cakmak v Minister for Immigration & Multicultural & Indigenous Affairs* (2003) 135 FCR 183; [2003] FCAFC 257 and *Sok v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 144 FCR 170; [2005] FCAFC 56. He noted that both of these decisions discussing the decision in *Meroka* (supra) accept the necessity for the domestic violence to cause fear for, or apprehension about, the victim's personal well-being or safety.

55. 55. In *Cakmak*, the Full Court disapproved the decision in *Meroka* in part. Gyles, Conti and Allsop JJ said at [64]:

The necessity for the violence to cause fear for, or apprehension about, the victim's well-being or safety underlines that meaning.

56. 56. The Full Court considered the situation where the Tribunal's reasons were directed to the declarations of the competent persons as well as to the statutory declarations by the appellant. The Tribunal had found that the statutory declarations of the competent persons under reg.1.26 did not satisfy the requirement of the regulations:

...fundamentally because it was of the view that the statutory declarations of Mr Cakmak were an inadequate foundation upon which one could conclude that there had been relevant domestic violence.

[75] Implicit in the Tribunal's approach was that the statutory declarations of Mr Cakmak were inadequate to satisfy reg. 1.23(1) (g), 1.23(2) (b), 1.24 and 1.25. We agree. That finding was open on the material, and we are inclined to think it is the only view available.⁸

57. 57. The statutory declarations by Mr Cakmak, upon which all depended, were held by the Full Court not to refer to "violence" involving the application, or threat of application, of *force* such that the

⁷ Court Book at 66

⁸ [2003] FCAFC 257 at [74] – [75]

alleged victim is caused to fear for, or be apprehensive about, his or her well-being or personal safety.

58. 58. In the more recent decision of *Sok*, the Full Court decided not to follow the earlier decision in *Cakmak*. In *Sok*, Branson J, with whom Marshall J agreed, took the view that the true meaning of regulation 1.23(2)(b) is that the “violence” referred to in the regulation is not restricted to physical violence, saying at [27]:

It seems to me that this conclusion accords with notions of fairness and with what may be assumed to be the policy lying behind regulation 1.23(1)(g).

59. 59. In my view, with respect, neither the decision in *Cakmak* nor the decision in *Sok* directly concerns the matter which I have to decide. It is the nature of the violence alleged that is in issue. In my view, the fact that the majority in *Sok* declined to follow the decision in *Cakmak* is not a matter that this Court can take into account.

60. 60. Mr Jones, for the Applicant, referred the court to the decision of Ryan J in *Meroka* (supra) at [34], a decision which was disapproved in part by the Full Court in *Cakmak*. It is not my reading of the decision in *Cakmak* that their Honours disapproved the opinion expressed in *Meroka* at [34]. Accordingly, I disagree with the view expressed by counsel for the Minister that the particular passage quoted by the Applicant does not assist him. In my view, with respect, Ryan J was doing no more than following the ordinary English meaning of the regulation and considering it in context when he said:

I do not consider that the competent person need state expressly that in his or her opinion relevant domestic violence has been suffered. The requisite statement of opinion may be conveyed by implication having regard to the way in which the standard form directs the attention of the competent person to the definition of “domestic violence” in Reg.1.23(2)(b). The implication arises in the context of that direction from the insertion in the respective spaces provided of the name and date of birth of the victim and the full name of the person to have perpetrated the domestic violence.⁹

⁹ (2002) 117 FCR 251; [2002] FCA 482 at [34]

61. 61. It appears quite clear that the competent persons, having had their attention drawn by the form to the definition of “domestic violence”, would in their conclusions use that term in the way it had been defined. There is nothing that I can see in the regulation that requires a competent person, when expressing his or her professional opinion, to recite the definition of relevant domestic violence that is contained in reg.1.23(2)(b).
62. 61. Accordingly, I am satisfied that the Tribunal fell into jurisdictional error in importing a requirement into reg 1.26 that the competent persons should specifically quote the definition of relevant domestic violence in reg 1.23(2)(b).
63. 62. As the Applicant has succeeded in both of his arguments, as he needed to do, it follows that I should grant the application.

I certify that the preceding sixty-two (62) paragraphs are a true copy of the reasons for judgment of Scarlett FM

Associate: Virginia Lee

Date: 30 October 2006